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DEPARTMENT OF THE INTERIOR

National Park Service

36 CFR Part 12

[NPS-WASO-REGS-14841; PX.XVPAD0517.00.1]

1024-AE01

National Cemeteries, Demonstration, Special Event

AGENCY: National Park Service, Interior.

ACTION: Final rule.

SUMMARY: The National Park Service is revising the definition of the terms *demonstration* and *special event*, applicable to the national cemeteries administered by the National Park Service.

DATES: This rule is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: A.J. North, National Park Service Regulations Program, by telephone: 202-513-7742 or e-mail: waso_regulations@nps.gov.

SUPPLEMENTARY INFORMATION:

We published a proposed rule on this subject in the **Federal Register** on August 29, 2013 (78 FR 53383). The proposed rule's comment period ended on October 28, 2013, and resulted in three timely submitted comments, a portion of which were duplicative of each other. After carefully considering the comments, we have decided to adopt the proposed rule unchanged. The comments and our considerations are

summarized in this preamble under **Consideration of Comments**.

Background

The National Park Service (NPS) is responsible for protecting and managing fourteen national cemeteries, which are administered as integral parts of larger NPS historical units. A list of the national cemeteries managed by the NPS may be viewed at <http://www.cem.va.gov/cem/cems/doi.asp>.

The national cemeteries administered by the NPS have been set aside as resting places for members of the fighting forces of the United States. Many activities and events that may be appropriate in other park areas are inappropriate in a national cemetery because of its protected atmosphere of peace, calm, tranquility, and reverence. The NPS continues to maintain its substantial interest in maintaining this protected atmosphere in its national cemeteries, where individuals can quietly visit, contemplate, and reflect upon the significance of the contributions made to the nation by those who have been interred there.

In *Boardley v. Department of the Interior*, 605 F.Supp. 2d 8 (D.D.C. 2009), the United States District Court for the District of Columbia noted that the NPS definition of the term *demonstration* in 36 CFR 2.51(a) and 7.96(g)(1)(i) could pose a problem on the scope of the agency's discretion, insofar as it could be construed to allow NPS officials to restrict speech based on their determination that a person intended to draw a crowd with their conduct. The NPS had not applied, nor intended to apply, its regulations in an impermissible manner. Nevertheless, to address the District Court's concerns in *Boardley*, the NPS narrowed the definition of *demonstration* in 36 CFR 2.50, 2.51, and 7.96 (78 FR 14673, March 7, 2013; 78 FR 37713, June 24, 2013).

The NPS desires to maintain consistency in the regulations governing demonstrations and special events in park units, including our national cemeteries. Accordingly, we proposed to amend the terms *demonstration* and *special event* in § 12.3 to mirror the language used in 36 CFR 2.51 and 7.96. To avoid the possibility of a decision based on impermissible grounds, the rule revises the § 12.3 definitions of *demonstration* and *special event* by eliminating the terms “intent, effect, or likelihood” and replacing them with the term “reasonably likely to draw a crowd or onlookers.” These proposed revisions do not substantively alter the § 12.4 prohibition of special events and demonstrations within national cemeteries.

Consideration of Comments

Comment 1: The first commenter suggests the phrase “that attracts or” be added to the definition before the phrase “is reasonably likely to attract.” The commenter suggests this would help “avoid quarrelsome demonstrator’s [sic] efforts to subvert the rule’s purpose by arguing what is ‘reasonably likely’.”

Response: After review, we believe the suggested additional phrase is unnecessary. As explained in the proposed rule preamble, we believe that a “reasonably likely” standard is objective and easily and consistently understood. Further, this same standard has been successfully implemented in NPS regulations governing “demonstrations” in 36 CFR 2.50, 2.51, and 7.96.

Comment 2: The second commenter suggests that “peaceful demonstrations or vigils” should be allowed to occur in national cemeteries if they do not interfere with the NPS interests in maintaining a solemn atmosphere. The comment also suggests that while the NPS’s revised definition is a more objective standard, it lacks a necessary *mens rea*

requirement and guidance “as to what is reasonably likely to draw a crowd.”

Response: After review, the NPS respectfully disagrees. As detailed in the proposed rule, the NPS’s national cemeteries were established as national shrines in tribute to the gallant dead of our Armed Forces, and are to be protected, managed, and administered as suitable and dignified burial grounds and as significant cultural resources. These national cemeteries are intended to have a protected atmosphere of peace, calm, tranquility, and reverence, where individuals should be able to quietly contemplate and reflect upon the significance of the contributions made to the nation by those interred. Because the NPS has a substantial governmental interest to maintain this protected atmosphere, we have determined that even “peaceful” demonstrations and vigils would have a negative impact on the cemeteries’ atmosphere of peace, calm, tranquility, and reverence, and should be prohibited.

Moreover, because the NPS national cemeteries are non-public forums, the NPS need not prove that a “peaceful” demonstration or vigil threatens the cemetery's intended use. The Supreme Court has said that such a determination is not necessary for nonpublic forums, where “[t]he State, no less than a private owner of property, has power to preserve property under its control for the use to which it is lawfully dedicated.” “We have not required that [proof of past disturbances or likelihood of future disturbances] be present to justify the denial of access to a non-public forum on grounds that the proposed use may disrupt the property's intended function.” *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. at 46, 52 n.12 (1983).

The NPS rule does contain an implicit *mens rea* requirement, a criminal-intent element that courts generally find necessary for criminal regulations that impact First

Amendment activity, and which may be found either in the rule’s text, its regulatory history, or presumed by the courts. Finally, for the reasons earlier detailed, we believe that the “reasonably likely” standard is well understood.

Comment 3: The third commenter argues that the verb form definition of the word “conduct” and the phrase “casual park use” are ambiguous, suggests these could be construed to prohibit a mother who “inadvertently lets out a wail of despair” at the grave of her deceased son, and recommends that the word “conduct” be deleted.

Response: After review, we believe that neither the word nor phrase is ambiguous, when one fully considers the NPS’s complete two-sentence definition. The NPS notes that the word “conduct” is being used in its noun form, which addresses the manner in which a person behaves, and which the commenter concedes is not ambiguous. As earlier explained, the regulation’s “reasonably likely” standard is also well understood. As such, an expression of grief that is uttered by a mother at her son’s grave-side would not fall within the definition of a *demonstration*, especially since the national cemeteries are “where individuals can quietly visit, contemplate, and reflect upon the significance” of the interned. (78 FR 53384, August 29, 2013)

For the reasons detailed here and in the proposed rule, and consistent with First Amendment jurisprudence, the NPS is accordingly finalizing unchanged its proposed revised definitions of the terms *demonstrations* and *special events* at 36 CFR 12.3.

Compliance with Other Laws, Executive Orders, and Department Policy

Regulatory Planning and Review (Executive Orders 12866 and 13563).

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules.

OIRA has determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of Executive Order 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. Executive Order 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

Regulatory Flexibility Act (RFA).

This rule will not have a significant economic effect on a substantial number of small entities under the RFA (5 U.S.C. 601 *et seq.*).

Small Business Regulatory Enforcement Fairness Act (SBREFA).

This rule is not a major rule under 5 U.S.C. 804(2), the SBREFA. This rule:

- (a) Does not have an annual effect on the economy of \$100 million or more.
- (b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.
- (c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Unfunded Mandates Reform Act (UMRA).

This rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than \$100 million per year. The rule does not have a significant or unique effect on State, local or tribal governments or the private sector. It addresses public use of national park lands, and imposes no requirements on other agencies or governments. A statement containing the information required by the UMRA (2 U.S.C. 1531 *et seq.*) is not required.

Takings (Executive Order 12630).

This rule does not affect a taking of private property or otherwise have taking implications under Executive Order 12630. A takings implication assessment is not required.

Federalism (Executive Order 13132).

Under the criteria in section 1 of Executive Order 13132, the rule does not have sufficient federalism implications to warrant the preparation of a Federalism summary impact statement. This proposed rule only affects use of NPS administered lands and waters. It has no outside effects on other areas. A Federalism summary impact statement is not required.

Civil Justice Reform (Executive Order 12988).

This rule complies with the requirements of Executive Order 12988. Specifically, this rule:

- (a) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and
- (b) Meets the criteria of section 3(b)(2) requiring that all regulations be written in

clear language and contain clear legal standards.

Consultation with Indian tribes (Executive Order 13175 and Department Policy).

The Department of the Interior strives to strengthen its government-to-government relationship with Indian tribes through a commitment to consultation with Indian tribes and recognition of their right to self-governance and tribal sovereignty. We have evaluated this rule under the Department's consultation policy and under the criteria in Executive Order 13175 and have determined that it has no substantial direct effects on federally recognized Indian tribes and that consultation under the Department's tribal consultation policy is not required.

Paperwork Reduction Act (PRA)(44 U.S.C. 3501 et seq.).

This rule does not contain information collection requirements, and a submission to the Office of Management and Budget under the PRA is not required.

National Environmental Policy Act (NEPA).

This rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the NEPA of 1969 is not required because we have determined the rule is categorically excluded under 43 CFR 46.210(i) because it is administrative, legal, and technical in nature. We have also determined that the rule does not involve any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under the NEPA.

Effects on the Energy Supply (Executive Order 13211).

This rule is not a significant energy action under the definition in Executive Order 13211. A Statement of Energy Effects is not required.

Drafting Information: The primary author of this regulation was C. Rose Wilkinson, National Park Service, Regulations and Special Park Uses, Washington, D.C.

List of Subjects in 36 CFR Part 12

Cemeteries, Military personnel, National parks, Reporting and recordkeeping requirements, Veterans.

In consideration of the foregoing, the National Park Service amends 36 CFR Part 12 as follows:

PART 12—NATIONAL CEMETERIES

1. The authority citation for Part 12 continues to read as follows:

Authority: 16 U.S.C. 1, 3, 9a, and 462(k); E.O. 6166, 6228, and 8428.

2. Revise the part heading as set forth above.

3. Amend § 12.3 by revising the definitions of “demonstration” and “special event” to read as follows:

§ 12.3 Definitions.

* * * * *

Demonstration means a demonstration, picketing, speechmaking, marching, holding a vigil or religious service, or any other like form of conduct that involves the communication or expression of views or grievances, engaged in by one or more persons, the conduct of which is reasonably likely to attract a crowd or onlookers. This term does not include casual park use by persons that is not reasonably likely to attract a crowd or onlookers.

* * * * *

Special event means a sports event, pageant, celebration, historical reenactment, entertainment, exhibition, parade, fair, festival, or similar activity that is not a demonstration, engaged in by one or more persons, the conduct of which is reasonably likely to attract a crowd or onlookers. This term does not include casual park use by persons that is not reasonably likely to attract a crowd or onlookers.

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Dated: May 27 2014

Rachel Jacobson
Principal Deputy Assistant Secretary for Fish and Wildlife and Parks

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